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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street N.W.
Washington, D.C. 20536

[redacted]

MAR 04 2004

File: WAC 02 118 50888 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a construction and equipment rental firm. It seeks to employ the beneficiary permanently in the United States as a diesel mechanic. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel contends that the director failed to consider the depreciation expense declared on the petitioner's federal tax returns.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g) states in pertinent part:

> (2) *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the [CIS].

Eligibility in this case rests upon the petitioner's continuing ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 204.5(d). Here, the petition's priority date is December 13, 1996. The beneficiary's salary as stated on the approved labor certification is $670.40 per week or $34,860.80 annually.

Included in its submission of its evidence of ability to pay the beneficiary's proposed salary, the petitioner submitted copies of Form 1040, U.S. Individual Income Tax Return for the petitioner's owner for the years 1997 through 1999 and the petitioner's Form 1120, U.S. Corporation Income Tax Return for the years 2000 and 2001.

The individual tax return for 1997 indicates that the owner declared an adjusted gross income of $41,050 including a business income of $38,028.

The individual 1998 tax return reflects that the petitioner's owner had an adjusted gross income of $22,273 including a business income of $13,599.

The 1999 individual tax return shows an adjusted gross income of $32,782 including a business income of $19,734.

The 2000 federal corporation tax return subsequently filed after the petitioner merged with another business, reflects that it declared a taxable income before net operating loss deduction (NOL) and other special deductions of $19,540. Schedule L (Balance Sheets per Books) shows that the petitioner had $-26,605 in net current assets.

The 2001 federal corporation tax return shows that the petitioner declared a taxable income before NOL deduction and other special deductions of $-0-. Schedule L indicates that the petitioner had $-60,286 in net current assets.

The director denied the petition, determining that the petitioner had not established its ability to pay the proffered wage as of the priority date of the visa petition and continuing until the present. The AAO notes that the even though the owner's income exceeded the proffered wage in 1997, the beneficiary's proposed salary of $34,860.80 represents 84% of the owner's income that year. It is implausible to assume that the owner could support himself, his spouse and two dependents on the remaining funds. In *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982) *aff'd*, 703 F. 2d 571 (7th Cir. 1983), the court concluded that it was highly unlikely that a petitioner could support himself, his spouse and five dependents on a gross income of slightly more than $20,000 where the beneficiary's proposed salary was $6,000 or about 30% of the petitioner's gross income. Additionally, none of the remaining tax returns establish that the either the declared income or the amounts reflected as net current assets could cover the beneficiary's proposed wage.

On appeal, counsel resubmits copies of the tax returns and contends that the depreciation expense should be added back to the petitioner's income. In determining the petitioner's ability to pay the proffered wage, CIS (formerly INS) will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. V. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *Ubeda v. Palmer, supra.*

As set forth in its federal tax returns contained in the record, neither the level of the petitioner's income nor its net current assets were sufficient to persuasively demonstrate its continuing ability to pay the proffered salary as of the priority date of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.